Supreme Court, U. S.
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No. 80-173

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1980

CHARLES BARMAT,

Appellant,

vs.

LLOYD ROBERTSON, Superintendent, DEPARTMENT OF LIQUOR LICENSES AND CONTROL; ARIZONA DEPARTMENT OF LIQUOR LICENSES AND CONTROL, an Arizona administrative agency,

Appellee.

ON APPEAL FROM THE
ARIZONA COURT OF APPEALS

REPLY BRIEF OPPOSING MOTION TO DISMISS

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CLARIFICATION OF THE APPELLEE'S STATEMENT OF THE CASE.

The Appellant's liquor license was suspended solely because he allowed a female employee to dance nude in his theater. See Jurisdictional Statement at 13a-14a. The nature of the dance, albeit protected expression or gross sexuality, was not deemed relevant by the Arizona Department of Liquor License and Control. Consequently, the nature of the dance, as described by Officer Williams (see Motion to Dismiss at 4) was not significant to the Department's decision. Nevertheless, two witnesses, who were familiar with the dancer's routine, testified that she did not perform the type of acts described by Williams. See Document 9, Clerk's Certification of the Record on Appeal Item 1 at 32, 38. Since in the eyes of the Liquor Department nudity alone was determinative,

no fact finder has decided which description of the employee's dance is the most accurate.

The question presented to this Court is whether there should be a judicial determination that the dance in question partook more of gross sexuality than of communication before the license can be suspended.

ARGUMENT

I. A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THIS APPEAL.

The Appellee's framing of the principle question addressed to this court is misleading:

> 1. Whether the state, under the broad authority of the twenty-first amendment, can regulate nude performances on premises licensed to sell intoxicating beverages.

Motion to Dismiss at 1

The real question presented is whether all such performances or dances, regardless of form or content, can be absolutely prohibited by the state. The Appellee appears to argue that such a prohibition is clearly permitted by law. See Motion to Dismiss at 7. The principle case cited for this black letter proposition is California v. LaRue, 409 U.S. 109 (1972). LaRue, however, does not go so far.

LaRue upheld the facial constitutionality of regulations that were designed to prevent gross forms of misconduct and crime that had been associated with gross forms of nude dancing in California. The regulations not only prohibited live performances, but also prohibited the displaying of films or pictures that depicted acts that could not be performed live. Id. at 112. While the regulations were

broad enough to include forms of dancing that are not grossly sexual, the Court made clear that it was addressing itself to the forms of nude dancing that fall to the level of bacchanalian revelries:

> This is not to say that all such conduct and performance is without the protection of the First and Fourteenth Amendments. But we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of Bacchanalian revelries which the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a

scantily clad ballet troupe in a theater. Id. at 118."

This more limited interpretation of LaRue was supported by this Court in Craig v. Boren, 429 U.S. 190 (1976) where this Court stated:

> "It is true that California v. LaRue [citation omitted] relied on the Twenty-First Amendment to "strengthen" the State's authority to regulate live entertainment at establishments licensed to dispense liquor, at least when the performance "partake more of gross sexuality than of communication." (Emphasis added) 429 U.S. at 207.

but see Doran v. Salem Inn, 422 U.S. 422, 932-34 (1975).

Contrary to the Motion to Dismiss,

the lower courts have not always been willing to accept the absolutist version of LaRue advocated by the Appellee. For instance, in Escheat v. Pierstorff, 354 F.Supp. 1120 W.D.Wis. 1973), the court ordered that a tavern be given a judicial hearing before its license could be revoked because nude dancing had occurred on the premises. The attempted revocation was pursuant to a Wisconsin statute that permitted a city to revoke a liquor license if the owner "kept or maintained...an indecent or improper house." Contrary to the discussion of Pierstorff in the Motion to Dismiss at 11, the Court did not concern itself with the possible overbreath of the Wisconsin statute. Rather, the court treated LaRue as directly applicable, and reasoned that LaRue does not permit a state to prohibit all forms of nude entertainment in establishments

licensed to sell liquor. Id. at 1125-26. The court held that a judicial hearing was necessary to determine if the nude entertainment in question was of the type properly proscribed pursuant to LaRue. Id. at 1126-27. The Pierstorff holding, therefore, is directly supportive of the Appellant's position in this Court.

The Appellee's distinction of Peto v. Cook, 364 F.Supp. 1 (S.D.Ohio 1973) aff'd sub nom 415 U.S. 943 (1974) is also misleading. While it is true that Peto only held unconstitutional a regulation that prohibited a licensee from having "indecent, profane or obscene literature, pictures or advertising material," id. at 3, the court also stressed that LaRue "is applicable only where certain types of live entertainment...partake more of gross sexuality than of communication." Id. at 3. (Emphasis added). Moreover, the LaRue decision also upheld a regulation that

prohibited the displaying of films or pictures of nude entertainment. 409 U.S. at 112. Nevertheless, the Peto court held that there had to be a judicial hearing to determine if printed materials were obscene before a licensee could be prohibited from having the materials on his premises. Id. at 4-5.

Finally, the Appellee argues that Clark v. City of Freeman, Nebraska, 337 F.Supp. 327 (D.Neb. 1973) and Bellanca v. New York State Liquor Authority, 50 N.Y.2d 616, 407 N.E.2d 460 (1980) do not support Appellant Barmat's position in this case. See Motion to Dismiss at 11-12. Clark required prompt judicial review before a liquor license could be suspended because a licensee had permitted a female employee to expose her breasts during a performance, but that no such review was required if the employee had performed in the nude.

Id. at 242-44. Bellanca held unconstitutional regulations that prohibited topless dancing in establishments licensed to sell liquor. 407 N.E.2d at 463-64.

To accept the distinction urged by the Appellee, it would have to be accepted that there is a difference of constitutional dimension between a woman dancing in a tavern wearing only a g-string, and a woman dancing wearing nothing at all. It is doubtful that the confluence of the First and Twenty-First Amendments should give rise to such a distinction. The fact that the distinction appears to have been adopted by at least one court, Clark, supra, highlights the need for clarification of the law in this area.

II. THE FEDERAL QUESTION RAISED IN THIS COURT WAS PROPERLY RAISED IN THE ARIZONA COURTS AND DECIDED UPON BY THE ARIZONA COURT OF APPEALS.

The question presented to this Court is not whether the Arizona regulations in question have a rational basis. Compare Motion to Dismiss at 12. Rather the question is whether a liquor license may be constitutionally suspended pursuant to those regulations because nude dancing occurred on the licensed premises without there first being a judicial determination that the dance partook more of gross sexuality than of communication. This question was properly raised, as was set out in the Jurisdictional Statement at 11-17. The Superior Court of Pima County ruled that such a judicial hearing is required. See Jurisdictional Statement at 17a-18a. The Arizona Court of Appeals framed the question as follows:

"Does a finding by the Arizona State Liquor Board that a licensee violated the nude dancing provisions of Superintendent's Regulations R4-15-54.1, R4-15-55-A.3 and R4-15-55.C require a judicial determination that the conduct found to be in violation partook more of gross sexuality than communication in order for an order of suspension to issue?"

Barmat v. Robertson, ___ Ariz. ___, ___, 611 P.2d 101, 101 (Ct.App.1980) Jurisdictional Statement at 2a.

In deciding that question, the Arizona Court reversed, relying almost exclusively on Richter v. Department of Alcoholic Beverage Control, 559 F.2d 1168 (9th Cir.

1977) cert. den. 434 U.S. 1046 (1978). See Barmat, supra, at ___, 611 P.2d at 103; Jurisdictional Statement at 7a-11a. In his motion for rehearing, the Appellant, herein, (the Appellee in the Arizona Court of Appeals) argued that Richter was distinguishable from the instant case because Richter involved regulations that were promulgated after extensive testimony concerning misconduct and crime that were occurring in bars that offered nude entertainment in California. See Appendix at 1a-7a, infra. The Appellant argued that since no such testimony had been presented in Arizona, a hearing was now necessary to determine if the dance in question fell within the proper scope of LaRue:

> "Since, unlike California, there has never been any finding in Arizona that the combination of alcohol and nude dancing

leads to acts of gross misconduct, Richter is not applicable to the instant situation. Therefore, a hearing is necessary here to determine if the nude dancing at the Ranch House Theater was akin to the bacchanalian revelries that were going on in California. See Appendix at 5a.

Surely, the mere fact that a litigant raises a basis for distinguishing a case in a motion for rehearing that was not raised in his brief, should not preclude him from obtaining review by this Court.

Moreover, the distinction between the California regulations and the Arizona regulations was discussed both in the appeal before the Arizona State Liquor Board and the Pima County Superior Court.

See Appendix at 8a, 9a-11a, 12a-19a. The distinction was not immediately presented to the Arizona Court of Appeals as the Appellant was endeavoring to support the ruling of the Pima County Superior Court which did not rely on that distinction. See Jurisdictional Statement at 17a-18a. Therefore, even if this distinction could properly be considered an "issue," it was properly preserved according to Arizona law. See Jennings v. Roberts Scott & Co.,Inc., 113 Ariz. 57, 59, 546 P.2d 343, 345 (1976).

CONCLUSION

For all the above reasons, and those contained in the Jurisdictional Statement, this Court should note probable

jurisdiction of this Appeal.

Dated: September 24, 1980.

Respectfully Submitted,

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ARIZONA COURT OF
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IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

ROBERT R. BEAN, Superintendent, Department of Liquor Licenses and Control; Arizona Department of Liquor Licenses and Control, an Arizona administrative agency, Appellant, vs. CHARLES R. BARMAT, Appellee.	No. 2 CA-CIV 3299 (Pima County Superior Court Case No. 158329) MOTION FOR REHEARING

The sole issue presented on appeal is: May the Arizona State Liquor Board suspend the license of an Arizona establishment licensed to sell alcoholic beverages solely because the proprietor of the establishment permitted entertainers to dance in the nude?

Any resolution of this issue must begin with an analysis of the decision of the United States Supreme Court in California v. LaRue, 409 U.S. 109 (1972). In LaRue the Court considered the facial constitutionality of regulations by the California Department of Alcoholic Beverage Control which prohibited the performance of acts of sexual intercourse, masturbation, sodomy and similar acts, or the display to the public or fondling of genitals, breasts, anus or pubic hair in places licensed to sell liquor. The regulations also prohibited licensed establishments from displaying films or pictures which depicted the above acts. Id at 111-12.

Before promulgating the regulations, the Department heard numerous witnesses who testified about the type of activity that was occurring in California bars that offered nude entertainment. Customers were engaging in oral sex with entertainers. Others were masturbating in public. Patrons of these bars were seen placing rolled currency directly into the vaginas of female entertainers. There were reports of indecent exposure to young girls, rape and assaults on police officers in or immediately

adjacent to the bars. Id. at 111.

Based on this testimony, the Court found the regulations facially constitutional. The Court however was careful to point out the limits of the decision: "The substance of the regulations...prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment 'performances' that partake more of gross sexuality that of communication." Id. at 118. (emphasis added). Moreover, the Court distinguished the type of conduct described by the witnesses at the hearing before the California Department of Alcohol Beverage Control from other forms of entertainment:

> ...we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater. Id.

Undoubtedly recognizing, however, that the regulations might also be applicable to performances more akin to the performance of a scantily clad ballet troupe, the Court reserved a decision on the constitutional applicability of the regulations to actual performances:

> "Although it is possible that specific future application of [the statute] may engender concrete problems of constitutional dimensions, it will be time enough to consider any such problems when they arise. We deal here only with the statute on its face. And we hold that so considered, the legislation is constitutionally valid." Id at n.5.

Thus, the United States Supreme Court in LaRue did not decide how far a state may go in prohibiting nude entertainment pursuant to its authority to regulate the sale of alcoholic beverages. Indeed, conflicting dicta in subsequent decisions

by the Court have further clouded the issue. In Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), the Court said that the Twenty-first Amendment outweighs any First Amendment interest in nude dancing. Id at 933-34. In a more recent decision, however, Craig v. Boren, 429 U.S. 190 (1976), the Court concluded an extensive discussion of the Twenty-first Amendment by indicating that a state may only prohibit nude entertainment pursuant to that amendment when the "performances partake more of gross sexuality than of communication." Id. at 207. Thus the Court was surely referring back to testimony before the California Department of Alcohol Beverage Control about the gross activities that had been occurring at these establishments in California.

Predictably, lower courts have arrived at apparently conflicting decisions when attempting to apply the LaRue holding to concrete factual situations. Compare Clark v. City of Freeman, Nebraska, 377 F.Supp. 327 (D.Neb. 1974); Peto v. Cook, 364 F.Supp. 1, (S.D.Ohio 1973) aff'd 415 U.S. 943 (1974); Escheat, Inc. v. Piersdorff, 354 F.Supp. 1120 (W.D.Wisc. 1973), and Richter v. Department of Alcoholic Beverage Control, 559 F.2d 1168 (9th Cir. 1977). The former cases have held that there must be a judicial determination that the nude performance in question partook more of gross sexuality than of communication before a license may be revoked or suspended. Accord, The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors, 75 Colum.L.Rev. 1578 (1975). The latter decision, Richter, held that no such judicial determination is necessary.

In rendering its decision in the instant appeal, this Court has relied almost exclusively on the Richter decision. That reliance is misplaced because Richter deals with a different issue that the one presented to this Court. The Richter court was dealing

with the same regulations upheld by the Supreme Court in LaRue. The courts in LaRue and Richter were dealing with regulations that had been promulgated only after a number of witnesses had testified to the degeneration of the California bars to the point where grossly offensive acts of sexuality and lewdness were being permitted. The testimony showed these acts were leading to other crimes in or near the licensed premises. Clearly, the conduct at these bars, which the Court described as bacchanalian revelries, was not the constitutional equivalent to the performance of a ballet troupe at a theater. LaRue, supra, at 118. The Richter court specifically referred to the testimony before the Department "of widespread shocking and illegal sexual activity occurring in or near the 'topless' and 'bottomless' bars." 559 F.2d at 140.

In Arizona however, there has never been a factual finding, administrative or judicial, that the nude dancing at the Ranch House Theater or similar establishments is associated with the bacchanalian revelries or shocking, illegal sexual activity previously present in California. Indeed, the testimony before the Superintendent, prior to the promulgation of the Arizona Regulations, shows the benign nature of nude dancing in bars in Arizona.

For instance, at the hearing before the Superintendent, an owner of five bars in the Phoenix area, one of them a nude dancing establishment, testified that there was less trouble and misconduct at his nude dancing bar than at his other bars. See Transcript of Public Hearing before Honorable Harold H. Moore, Superintendent of the Arizona Department of Liquor Licenses and Control, August 14, 1973 at 16-18. Document 9, Clerks Certification of Record on Appeal, Item 1, Licensee's Exhibit 4. Similarly, other witnesses testified that Arizona had not experienced the

type of misconduct testified about before the California Department of Alcoholic Beverage Control. Id at 20, 26, 28, 35, 36. Finally, unlike the California Department, Superintendent Moore expressly made no findings of fact. Id at 30. There was no testimony at all before the Superintendent that showed that any misconduct at all had occurred in nude or semi-nude dancing bars in Arizona. Id. Moreover, testimony by the complaining police officer at the administrative hearing on the instant alleged violation establishes that, to the present, no such conduct has occurred in Arizona:

> [QUESTION BY MR. HIRSH]: There is a potential for violence, as a matter of fact, in any bar that you go into if people are talking, if they shoot their mouths off in drinking, there is a potential for violence, am I correct sir?
>
> WILLIAMS: Yes.
>
> HIRSH: So the potential at the Ranch House isn't any greater than it is in any other bar or any other place where people congregate, they vocalize and they drink, isn't that true?
>
> WILLIAMS: That's correct.
>
> Document 9, Clerks Certification of the Record on Appeal, Item 1, Transcript of Administrative Record, December 5, 1975 at 51.

Since, unlike California, there has never been any finding in Arizona that the combination of alcohol and nude dancing leads to acts of gross misconduct, Richter is not applicable to the instant situation. Therefore, a hearing is necessary here to determine if the nude dancing at the Ranch House Theater was akin to the bacchanalian revelries that were going on in California. The mere fact that the dancing at the Ranch House may not have been the artistic equivalent of a performance of a scantily clad ballet troupe does not mean that it should be considered to be the constitutional equivalent of the bacchanalian

revelries or shocking sexual activities that were occurring in California. For as Chief Justice Cameron said in State v. Gates, 118 Ariz. 357, 576 P.2d 1357 (1978):

> "* * * while the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by the judges) or in quality (as viewed by the critics), it may not differ in substance from the dance viewed by the person who, having worked overtime for the necessary wherewithal, wants some 'entertainment' with his beer or shot of rye." Salem Inn, Inc. v. Frank, 501 F.2d 18, 21 n. 3 (2nd Cir. 1974) aff'd 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975).

Therefore, until there is a factual finding in Arizona that the mix of alcohol and nude dancing will lead to the gross misconduct that happened in California, dancers should be allowed to continue dancing in the nude in places like the Ranch House Theater. Consequently, this Court's heavy reliance on Richter, which was dealing with regulations predicated on a factual finding, was misplaced.

The instant case raises a novel issue that originates in California v. LaRue. Based on a finding of the Department Of Alcohol Beverage Control, after substantial testimony, that alcohol and nude dancing were leading to gross acts of lewdness and sexuality, the Supreme Court upheld regulations that prohibited such dancing in establishments licensed to sell liquor. In Richter, the Court of Appeals held that no judicial finding of gross sexuality is necessary before a license may be revoked pursuant to the California regulations upheld in LaRue. Once again, the Richter court relied on the testimony before the Department of the "shocking sexual activities" associated with the nude dancing bars. 559 F.2d at 1170. In Arizona, however, where there has been no finding or testimony about misconduct connected with

alcohol and nude dancing, such reasoning should not apply. Indeed, in Arizona all the available evidence indicates that there is no such connection. Until such a finding is made, dancers in establishments such as the Ranch House should be allowed to continue to dance in the nude. Therefore, it is respectfully requested that this Court reconsider its earlier decision in this case.

Dated: March 10, 1980.

HIRSH & BAYLES, P.C.

By _____
L. Anthony Fines
Attorneys for Appellee

Copy of the foregoing
mailed this date to:

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EXCERPT FROM LICENSEE'S MEMORANDUM TO DEPARTMENT OF LIQUOR LICENSES AND CONTROL, DOCUMENT 15, CLERKS CERTIFICATION OF RECORD ON APPEAL AT 40

Moreover, the Court stated:

> "The substance of the regulation struck down prohibits licensed bars or night clubs from displaying, either in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of communication". California v. LaRue, supra, 34 L.Ed.2d at 352. (Emphasis added)

The above-quoted comments from California v. LaRue, supra, established two important points:

1. The case was concerned with a facial challenge to the liquor regulations and did not exclude a challenge to these regulations in a specified factual setting; and

2. The prevention of "gross sexuality" was the legitimate state interest which justified the regulations.

The gross sexuality or bacchanalian revelries the Court was concerned with included: (a) Oral copulation with woman dancers; (b) Customers engaged in public masturbation; (c) Rolled currency placed, or picked up, in the vagina of the entertainer; (d) Numerous other forms of physical contact with the breast or pubic area of the dancer by the customer. Also noted was the problem of prostitution, indecent exposure to young girls, attempted rape, rape and assaults on police officers. Not one of these factors is present in this case. California v. LaRue, supra, governs if, and only if, bacchanalian revelries and/or gross sexuality is present. Salem Inn, Inc. v. Frank, _____ F.2d _____ (2d Circuit, decided 8/28/75):

> "Judge Bartels found that the ordinance was not jusitfied as an exercise of delegated

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CLOSING ARGUMENT BEFORE LIQUOR BOARD, DOCUMENT 9, CLERK'S CERTIFICATION OF RECORD ON APPEAL, ITEM 1, pp. 52, 53 AND 54, TRANSCRIPT OF ADMINISTRATIVE RECORD

HIRSH: I--, you know, without getting into the legal---we filed a substantial memorandum that Michael has not responded, perhaps he has no response, he feels, I mean there's nothing right, let me put it this way, and it's a legal argument and it gives the justification to set aside these regulations for a number of reasons, and you can do it, you have the power to do it, and I look at this as a very simple matter, and you have the jurisdiction to do it, and a very simple question before you is, do these regulations serve any public purpose, and I think it's very easy for a judicial body, whether it's made up composed of citizens or judges or lawyers, to sit back and say; 'well, somebody passed the regulations and they are valid, and we are going to rubber-stamp them; but I tell you that's wrong, that these regulations whether they go this time or they go in course, or they go in five years but foolish, they bear no real and substantial relationship to the health, welfare and morals; they don't have any public purpose on the books, they rate on a natural situation with respect to entertainment; there's simply no justification for them in any way; and I ask you to do the right thing, the right thing is to set them aside or for whatever reason you want to use, and there's ample reason in this memorandum.

Now, I know that my expectation of success before this Board is very slim, and I'm sure it is very slim, simply for the reason that it's very easy for you to say; 'well, this is a matter for the courts, and we don't have the jurisdiction', but you do have jurisdiction, and I think the right thing for you to do, is to set these regulations aside. If you want me to give you a legal basis for it, I'll do it. First legal basis--is the violation of an individual's First Amendment rights, the right to express themselves, fully and properly, in the way the

individual desires to express himself or herself, and that's part of the dance, there's testimony to support that. If a person wants to put on a performance and project whatever the dancer is intending to project, they ought to have the right of freedom to dance whatever way they so choose. The only case that would uphold regulations of this sort, there was testimony before the Alcohol Beverage Control, that there was all sorts of lewdness that went on, on these places, and there was a causal connection between the nudity in the bars and the activity that went on. There's nothing in the record in Arizona, it never happened in Arizona, there's nothing before the record, on the record before the Superintendent, and I tell you this is one man's regulation. We can all sit here and laugh at this, laugh at the movie that was made, but the fact is, that the people want to see women dance, want to see men dance, and you know, there's something that's just unnatural about somebody walking out with a pastie and a G-string, and there's obviously people that desire to see this thing and they have a right to see it, there's no reason to prevent people from seeing this sort of activities.

You know one thing where I've argued these cases for years and years, and I know the judges that I've argued in front of that would go to private clubs to see the same thing that a man on the street wants to see and that wants to go into a place and have a drink, and everybody sort of snickers about it, but there's something to me very undemocratic about the legislative or judicial body that says; 'No, the public can't do this because I'm afraid the elector won't permit it or somebody is going to say I'm a bad fellow because I've allowed the nudity to go on publicly and yet that same fellow goes out and watches some sort of showing in a private club, and it's wrong, the man is free and has a right to see this sort of thing in this country, that's freedom, and they ought to have the right to do it, if he wants to do it, and if someone can provide that sort of entertainment for them, and there's nothing to do with the behavioral patterns of the human being, it has no effect on the behavior, and we know it, so it's just foolish. There's no way that Michael Low or anyone else can justify with these regulations; there's no way that we can legislate morality, or tell people what we should look at, what's going to keep us in views, in what we like to see and what incentively is proper, and whether you think this dancing of this sort doesn't meet with your esthetics, well, that's your opinion, we all have different opinions.

The matter, we're talking about the matter of right, the right of the dancer to freely express herself or himself, the right of the licensee to put this sort of entertainment on, the right of the public to see it, and it's an it's an unimportant thing, unimportant matter, and if there's a man, I'd worry--it'a very insignificant thing, but it's just one little vestige to refresh it, it's not there and it's not right, and we shouldn't have these rules on the books, and if there could be a dance, one reason, one justification---I tell you, it would be a different matter. But, there's nothing before us, and it's wrong ---

(SECRETARY ASKS FOR TAPE CHANGE)

I'm going to ask you to not read, not so much read the memorandum, which I think it's going to be difficult for you exceptionally cause your legal advisor, I've already made the argument with the legal advisor, your legal advisor is my adversary in this case--to give you legal advice would have no merit to my memorandum, but I think that Michael agreed, he did moments ago, you do have the authority to set this aside. I don't see it's a lost cause, I really don't --I don't see it's a lost cause before this Board, because I know the right thing to do is to set it aside, and if you do the right thing, you will.

But, I'd ask you to try and look and search for some justification for these regulations, you're interfering with somebody's liberty, in this country, it's someone's right to either see a dance or to put a dance on, and whether there's liquor there or not, simply is no (inaudible), and I ask you to weigh those reasons before, any reason

that you can find that would oppose my position on this before you make any ruling, and I think in the absence of any (inaudible) that you can see, I think the right thing to do is to give me a favorable----thank you.

SMITH: Thank you. Mr. Low?

LOW: Thank you Bob. I hope you don't feel I treated your memorandum so lightly that it didn't warrant any response on my behalf, in fact, I was duly impressed with both your research and your rather florid writing style. Simply, I had a lot of other matters that required my time and attention before I could sit down and prepare a legal memo in response, but I'd like to make a short legal argument and then comment upon the evidence that was adduced, and I recognize that it would have been probably more convenient and proper for me to draft a memo and provide Mr. Hirsh with a copy thereof, but I think that he is fully aware and familiar with the cases that I would like to bring to the Board's attention, and I think that there are three cases that are dispositive of this matter. They are the California v. LaRue case, the U.S. Supreme Court case that upheld the California's parallel regulation as proper exercise under the Twenty-First Amendment. There's the Yauch vs. State case which upheld the Tucson City Ordinance banning topless dancing in the city of Tucson. And then there's the recent case which is the Longbridge Investment Company vs. Harold Moore case which upheld these regulations as proper exercise of the Superintendent's authority.

Simply, I think Bob faces a tough road to hold with respect to constitutional and other legal arguments. I think that you are a public body, you're subject to petition by the people who have grievances, you can hear those grievances and you can seek to enact whatever remedial rules or regulations that you have under authority to redress a particular situation, that's why I felt that it's fine for Mr. Hirsh to raise the issue that this Board has authority to review these regulations. If the Board is of the mind that the regulations are not fit, could not serve the public interest, do not serve the interest that the legislature has articulated is part of the liquor laws of this state. The Board could certainly reverse the Superintendent's decision and instruct him to set up some kind of hearing on this whole matter, as to the validity of these regulations or perhaps other regulations. I don't argue with that procedure one way or the other. I do think in my mind that it's pretty darn clear that these regulations will be upheld. I think that counsel recognizes the problem he is facing and has tried to structure his defense accordingly, they tried to partition off the premises, they tried to make it appear that it's really a theater presentation, they presented testimony that this is a protected art form within the First Amendment. I think that under the cases, both the Yauch and Longbridge case, both courts treat the issue of nudity on these licensed premises and it's clear upon my reading of those cases that these regulations would be upheld.

Now, for the legal argument---I'll be as brief and probably not deserving of the memo that Bob has drafted and submitted to the Board's consideration. The plain facts of matter is we're here on the issue of the Superintendent's Suspension of the license issued to Charles Barmat, dba the Ranch House, the suspension to run for ten days, and I think that this is an appeal of that Suspension Order. I think that it's clear, from the evidence that we presented, that the violations set forth in the Suspension Order has been proven in this instance, and that violation simply is that the dance occurred on the date in question by the dance-entertainer, that certain portions of the nipples of the breast, portions of the pubic hair, anus, cleft of the buttocks, exposed the genitals, were exposed to view and displayed during the course of her entertainment at the various regulations that have been cited therein, that that allegation fits those particular regulations, I believe,

BRIEF OF PLAINTIFF, JULY 15, 1976, BARMAT v. BEAN, PIMA COUNTY SUPERIOR COURT CAUSE NO. 158329, CLERK'S CERTIFICATION OF RECORD ON APPEAL AT 74-81

II

SUPERINTENDENT'S REGULATIONS R4-15-54 THROUGH R4-15-58 ARE AN UNCONSTITUTIONAL ABRIDGEMENT OF FIRST AMENDMENT RIGHTS ON THEIR FACE BECAUSE THE VITAL TWENTY-FIRST AMENDMENT CONSIDERATIONS FOUND TO EXIST IN LARUE WERE NOT SHOWN TO BE PRESENT IN ARIZONA.

Prior to promulgation of Superintendent's Regulations R4-15-54 through R4-15-58, a public hearing was conducted pursuant to A.R.S. 41-1002.01, Arizona Administrative Act. The entire transcript of those proceedings has been appended to the record in

the present case. (Licensee's Exhibit No. 4).

During the course of the hearing conducted by the Superintendent of Liquor Licenses and Control, eleven witnesses testified. Only three of the witnesses expressed support for these regulations. The first, Sgt. Stan Cheskey, Pima County Sheriff's Office, did no more than state that as a representative of William Cox he was present to voice his support for the proposed regulations. Exhibit 4, p. 18, lines 18-23. The second witness, Ralph Fenderson, Assistant City Attorney of Scottsdale, read from an editorial indicating that there is a place for topless dancing but not in Phoenix or Scottsdale because it breeds organized crime. However, in spite of the fact that Mr. Fenderson would have complete access to police reports and other documents indicating misconduct or improprieties, he failed to cite even one incident in regard to nude dancing which occurred within his jurisdiction. Moreover, Fenderson's remarks suggested he was not concerned with the present problem but had a vague fear of some type of future problem.

The final witness testifying in favor of the proposed Superintendent's Regulations was Mrs. Harry Frey. (Exhibit 4, p. 52). Mrs. Frey appeared on behalf of the "Women's Club of Phoenix" and contended that problems existed in other states as a result of nude dancing, but was unable to point to any incident that had occurred in the State of Arizona.

It should also be pointed out that the Department of Liquor Licenses and Control by law (Superintendent's Regulation R4-15-32) receives reports of any misconduct which has occurred in a licensed premise. Therefore, Superintendent Moore had at his disposal the entire files of the Department of Liquor Licenses and Control, but failed to include in the record a single incident of misconduct or other impropriety that could in any way be associated with live nude entertainment.

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On the other hand, Herman Smiley and Barry Thybien, owners and operators of licensed liquor-dispensing establishments in both Phoenix and Tucson, testified that they have had no problems associated with live nude entertainment. Mr. Smiley and Mr. Thybien noted that they had been to and owned other establishments that did not offer this type of entertainment and had observed and experienced greater problems in those establishments. (Licensee's Exhibit 4, p. 9, 17 respectively). In addition, a third nightclub owner, Robert Landry, testified that his experience in the nightclub business in Tucson was the same as that experienced by Mr. Smiley and Mr. Thybien. (Id. at 26). Landry testified that he had never observed "lewdity" in clubs that he had visited throughout the state. (Exhibit 4, p. 26, l. 23). Also, he observed:

> ". . . I have never seen any sexual misconduct in any of the clubs that I have been in." Id. at 26, l. 14.

Landry further noted that the problems found to exist in California and discussed in California v. LaRue, supra, are not present in Arizona.

Two dancers, Mary Miller and Judy Brice, appeared in opposition to the regulations. (Exhibit 4, p. 61, 63 respectively). Their position can best be summed up by the comment of Ms. Miller:

> "I don't feel that there is anything obscene or immoral about topless dancing. I have spent maybe $2,000.00 on dancing lessons, acrobatic lessons, not to mention what I have tied up in wardrobe, costumes and what have you.
> I don't feel I am an obscene person. . . .
> You are taking away what I want to do.
> This is what I want to do in my life, . . ."
> (Exhibit 4, pp. 61-62).

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After termination of the Superintendent's hearing, the regulations at issue were passed. Obviously, any regulations made by the States in this area will have to meet the standards justifying such an infringement on First Amendment rights as set forth in California v. LaRue, 409 U.S. 109, 93 S.Ct. 390 (1970). Admittedly, the liquor regulations sustained in LaRue are virtually identical to the Arizona provisions. What is important to recognize is that Mr. Justice Rehnquist in the LaRue decision specifically noted that:

> "The department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at the premises that have licenses was not an irrational one. Given the added assumption in favor of the validity of State regulation in this area that the Twenty-First Amendment requires we cannot hold that the regulations on their face violate the Federal Constitution." 34 L.Ed.2d at 532.

The United States Supreme Court in LaRue not only stated that it was dealing with the California Liquor Regulations on their face, but, in addition, specifically recognized that the regulations were designed to prevent "gross sexuality" and "bacchanalian revelries". The gross sexuality or bacchanalian revelries the Court was concerned with included (a) oral copulation with women dancers; (b) customers engaged in public masturbation; (c) rolled currencies placed or picked up in the vagina of the entertainer; (d) numerous other forms of physical contact with the breast or pubic area of the dancer by the customer. These were the demonstrable dangers presented as a result of hearings conducted prior to promulgation of the California

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regulations. In addition, these regulations gained further support from the demonstration that California liquor establishments offering this form of entertainment were prone to numerous acts of prostitution, indecent exposure to young girls, attempted rape, rape and assaults on police officers. Not one of these factors was found to exist in Arizona.

The recent case of Salem Inn, Inc. v. Frank, 522 F.2d 1045, (2d Cir. 1975), is instructive:

> "Judge Bartels [District Court Judge] found that the ordinance was not justified as an exercise of delegated Twenty-First Amendment state power, first becasue there is not involved the kind of conduct properly subjected to regulation as a phase of liquor licensing, see California v. Larue, 409 U.S. 109 (1972) ("Bacchanalian revelries, sexual contact between entertainers and customers, prostitution"), and second because the instant offense applies to places not serving beverages as coffee shops, restaurants, dance halls and dischoteques. We agree with Judge Bartels in all respects and accordingly affirm." (Emphasis added).

Division One of the Arizona Court of Appeals in Longbridge Investment Company v. Moore, 23 Ariz.App. 353, 533 P.2d 564 (1975), considered a facial challenge to the instant regulations now at issue. That decision, however, did not address or consider whether or not California v. LaRue, supra, required a demonstrable state interest by way of public hearings. Specifically, Mr. Justice Rehnquist in LaRue stated:

> "References to the transcript of the hearing submitted by the department to the District

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Court indicated that in licensed establishments where 'topless' and 'bottomless' dancers, nude entertainers, and films displaying sexual acts were shown, numerous incidents of legitimate concern to the department had occurred. Customers were found engaging in oral copulation with women entertainers; customers engage in public masturbation; and customers placed rolls of currency either directly into the vagina of the female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact between the mouths of male entertainers and the vaginal areas of female performers were reported to have occurred.

Prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself and assaults on police officers took place on or immediately adjacent to such premises." 34 L.Ed.2d 347-348, 409 U.S. 111.

Justice Rehnquist in the LaRue case concluded:

"A common element in the regulations struck down by the District Court appears to be the department's conclusion that the sale of liquor by the drink and lewd or naked dancing should not take place in bars and cocktail lounges for which it has licensing responsibility. Based on the evidence from the hearings that it cited to the District Court, and mindful of the principle that in legislative rulemaking

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the agency may reason from the particular to the general, Assigned Car Cases, 274 U.S. 564, 583, 71 L.Ed. 1204, 47 S.Ct. 727 (1927), we do not think that it can be said that the department's conclusion in this respect was an irrational one."
34 L.Ed.2d at 350, 409 U.S. at 115-16.

Thus, it is clear that the California liquor regulations sustained by the United States Supreme Court in California v. LaRue, supra, were upheld on the ground that there was a sufficient state interest to justify the promulgation of this type of restraint. There is absolutely no evidence, direct, indirect, implied or implicit, that the problems which occurred in California are present in the State of Arizona. (See Licensee's Exhibit 4.)

The regulations at issue were promulgated by one man, the Superintendent of Liquor Licenses and Control. See Longbridge Investment Co. v. Moore, supra. Perhaps, he found nude dancing in liquor-dispensing establishments to be offensive. Offensiveness, however, is a subjective determination. While it is extremely questionable whether even the legislature, duly elected by the citizens, could properly make this decision without an adequate factual basis, it is clear that this is an entirely inappropriate area for an appointed administrator to make such a subjective state-wide determination. Even LaRue recognizes that, when such determinations are made in the areas of expression and expressive conduct, the rationality of the statute must be demonstrated by a showing of harms sought to be avoided. Here, the only rational conclusion is that certain state officials find these dances distasteful or personally offensive. Since that is an insufficient basis upon which to regulate expression on a state-wide basis, these regulations must be declared unconstitutional.

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There is simply no showing of even a rational basis for such broad restraints.

Even Mr. Justice Stewart in his concurring opinion agrees that the Twenty-First Amendment does not empower a state to act with "total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor within its borders". California v. LaRue, 409 U.S. at 120, 34 L.Ed.2d at 353.

Since there has been no showing of a legitimate state interest protected by the instant regulations, they must be overturned.

III

THE MULTIPLE FUNCTIONS PERFORMED BY THE ASSISTANT ATTORNEY GENERAL DURING THE HEARING PROCESS DEPRIVED THE LICENSEE OF A FAIR HEARING WITHIN THE MEANING OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The multiple functions performed by Assistant Attorney General Michael Lowe during the course of these proceedings operated to deny plaintiff the right to a fair hearing within the meaning of the Due Process Clause of the Fourteenth Amendment. It is axiomatic that administrative hearings, while exempt from strict observance of common law rules of evidence, must be conducted in a manner consistent with the fundamental dictates of the Due Process Clause. Brown v. Superior Court, 22 Ariz.App. 72, 74, 523 P.2d 799 (1974) ("Under A.R.S. 401-1009 and 41-1010 . . . a fully adequate hearing meeting all constitutional due process requirements is prescribed."); Jones v. Industrial Commission, 1 Ariz.App. 218, 401 P.2d 172 (1965).

In a strictly judicial context, the Courts have recognized that "even the appearance of unfairness cannot be permitted" [State v. Latigue, 108 Ariz. 521, 521, 523, 502 P.2d 1340 (1972)] because:

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